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ABSTRACT

Part of a 13-volume series designed to help Lutheran communities assess the feasibility of starting a Lutheran elementary school and to assist ongoing schools in current operation, this volume focuses on legal requirements affecting Lutheran schools. The first part deals with Lutheran schools under law and begins by touching on parental rights and responsibilities for choosing their children's education. State laws affecting private schools are then outlined, including laws concerning state approval, compulsory education, public support, tax exemption, and other school issues. Part 2 concentrates on the responsibility and liability of the congregation, board, principal, and teacher in the Lutheran school. Concerning the responsibility of the board of education, this section touches on the Family Educational Rights and Privacy Act, nondiscrimination on the basis of race or sex, due process rights, and the copyright law. The concept of negligence is explained and related to the liability of teachers and principals. (JM)

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LEGAL REQUIREMENTS

PART ONE LUTHERAN SCHOOLS - UNDER LAW

PART TWO THE BOARD, PRINCIPAL AND TEACHER - UNDER LAW

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PLANNING FOR LUTHERAN ELEMENTARY SCHOOLS

EA 012 098

EO 6

FOREWORD

Lutheran schools in America are flourishing.

Many Lutheran communities are presently conducting feasibility studies to determine if they can have a Lutheran school for their young people. The need for materials to help Lutheran congregations conduct feasibility studies and make responsible educational decisions has become quite urgent.

Through the coordinated efforts and generous financial help of Aid Association for Lutherans, representatives of the educational offices of the Association of Evangelical Lutheran Churches, American Lutheran Church and the Lutheran Church-Missouri Synod have combined their efforts in the development of PLANNING FOR LUTHERAN ELEMENTARY SCHOOLS materials. These materials are companion to PLANNING FOR LUTHERAN HIGH SCHOOLS, and PLANNING FOR LUTHERAN EARLY CHILDHOOD PROGRAMS.

PLANNING FOR LUTHERAN ELEMENTARY SCHOOLS has been designed to help Lutheran communities assess the feasibility of a school for their young people and make plans and responsible decisions for the establishment of a school. Resource materials are intended to assist existing schools in their ongoing operation. While these materials are designed to help congregational leaders, it is advisable to consult with synodical (district or regional) leaders as you begin planning your feasibility study.

Often the principal will be the first person to read this manual. I urge the principal to know the content of this document thoroughly. The principal will order additional copies for those who will benefit from its use. The above is true also for directors of education and early childhood programs.

The work of the following writers is herewith gratefully acknowledged: Dr. Glenn Bracht, Mr. Robert Eggold, Mr. Eldor Kaiser, Mr. Donald Kell, Mr. Ellsworth Kierbs, Dr. Glenn Kraft, Mr. Kenneth Markworth, Mr. Neal Meitler, Rev. Paul Pallmeyer, Mr. Richard Sauer, Mr. Wilbur Tewes and Dr. Martin Wessler. A special word of thanks to the synodical leaders who gave counsel and encouragement in this project: Dr. Victor Constien, Mr. Glenn Moenning, Dr. Al Senske, Dr. Marlin Schultz, Mr. Donald Vetter and Mr. Donald Zimmerman. Thanks to Lois Prahlow for artwork; Jim Reigles for editing; Lois Brandt, Harriette Johnson and Florence Schoenfeldt for typing and Trip Gesch for printing. To Aid Association for Lutherans staff members: Dr. Martin Koehneke, Mr. Fred Pahl, Mr. William Selle and Mr. Donald Stoike thanks for their encouragement and counsel.

These materials are dedicated to the glory of God for the extension of Lutheran education.

Printed in Milwaukee, Wisconsin
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Martin F. Wessler
Project Director

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PART ONE LUTHERAN SCHOOLS-UNDER LAW

This handbook provides a basic understanding of the major legal considerations affecting the planning, development, and management of Lutheran schools. Numerous documents have been prepared on a variety of legal considerations; many of these documents, or portions thereof, have been incorporated to provide a comprehensive handbook. The handbook is intended to be a ready resource for persons involved in feasibility studies, boards of education giving consideration to policy formulation, and school administrators required to make administrative decisions involving the day-to-day operation of the school.

Laws are subject to change at any time. As new laws are enacted, supplements to this document will be prepared.

A. LUTHERAN SCHOOLS AND SCHOOL LAW

Several important factors form the foundation upon which the Lutheran school functions in American society. One factor which requires our understanding is parental rights and responsibility for the education of their children. Another factor deals with the responsibility and authority of states to provide education equally for its citizens. The question which needs to be addressed is: To what extent are federal and state laws binding upon Lutheran schools?

1. Parental Rights

The right, responsibility and authority of parents to determine the education of their children finds its roots in Scripture, common law, official statements of the church and decisions set down by the U.S. Supreme Court.

a. Scripture's View

Scripture addresses parental responsibility as individual parents,

> "You fathers, again, must not goad your children to resentment, but give them the instruction, and the correction, which belong to a Christian upbringing." (Ephesians 6:4 The New English Bible)

and as God's people gathered,

> "If you listen, O Israel, and are careful to observe them, you will prosper and increase greatly as the Lord the God of your fathers promised you. Hear, O Israel, the Lord is our God, one Lord, and you must love the Lord your God with all your heart and soul and strength. These commandments which I give you this day are to be kept in your heart; you shall repeat them to your sons, and speak of them indoors and out of doors, when you lie down and when you rise. Bind them as a sign on the hand and wear them as a phylactery on the forehead; write them up on the doorposts of your house and on your gates." (Deuteronomy 6:3-9 The New English Bible)

Throughout the formative or creative period, common law development was nourished by philosophy, both classical and Christian, as well as by theology. Those who were students of law during the creative period of common law formulated concepts of the individual and the family which have continued to have impact on today's society and social practice.

b. *In Loco Parentis*

An early jurist wrote: "The authority of the father to guide and govern the education of his child is a very sacred thing bestowed by the Almighty and to be sustained to the uttermost by human law."[1] The common law system placed the principal responsibility upon the father to decide the kind, extent, and nature of the education which his child was to receive. As thought developed in this area, education was placed alongside of food, clothing, shelter, medical care, and other provisions necessary for the child's well-being, and the father was charged by the law to make such provisions.

The *in loco parentis* doctrine, though somewhat eroded in recent court decisions, finds its roots in common law. The foundation of the doctrine suggests a parent's release of certain educational responsibilities to another person, normally a teacher, tutor, or craftsman for the educational benefit of the child.

c. The Lutheran View

The Lutheran Church, particularly the Missouri Synod, has strongly affirmed the natural rights of parents as they involve the education of the young. There was strong opposition to school-reform legislation on the part of the Synod during the later part of the 19th Century. Bills such as the Wisconsin's Bennett Law, passed in 1889, contained the provision that every parent is to send his children between the ages of seven and fourteen to a public or private school in the district in which he resides. It further provided that the local school board was to determine the number of weeks and the times of attendance for the schools. The law also required that reading, writing, arithmetic, and U.S. History be taught in the English language.[2]

The official declaration of the Missouri Synod toward the relation of the state to church-sponsored schools was couched at that time in these words:

> Whereas, the word of God, our rule of life, enjoins upon all Christian parents the duty of bringing up their children in the nurture and admonition of the Lord, therefore all Christians who educate their children in schools are in duty bound to entrust their children who are not yet confirmed in Christian truth to such schools only as secure the education of children in the nurture and admonition of the Lord, while at the same time it is with us self-understood that we are willing to make good citizens of our children to the utmost of our ability and that we also endeavor to give them the best possible schooling in the use of the English language.
>
> Whereas, in the nonreligious public schools, wherever they are conducted in the sense of the nonreligious State, not only Christian education is excluded but also, as a rule, things not in harmony with the word of God are by the way of instruction and discipline, inculcated on the children and the spiritual life of Christian children is thus endangered and impaired, therefore, we as Christians are in conscience bound to submit to no law of the state which is directed,

> or may be used, toward forcing our children into such public schools.
>
> In accordance with our daily prayer, "Thy Kingdom come," it is our duty to preserve and extend the Orthodox Evangelical Lutheran Church in this country and we are, therefore, in conscience bound to combat each and every law which is directed, or may be used to the detriment and damage of Lutheran parochial schools, which are effective means of extending and perpetuating the Kingdom of God.
>
> For as much as our Lord Jesus Christ says, "My Kingdom is not of this world," and, "Render unto Caesar the things which are Caesar's and unto God the things that are God's," the separation of church and state is for all times to be acknowledged as in accordance with the word of God, and since God has in this country vouched safe unto us the precious boon of religious liberty, we may not as faithful stewards approve of any legislation which tends toward a confusion of spiritual and secular affairs and endangers our religious liberty; and we most cordially approve of combating with legitimate means such laws as have to the detriment and damage of our parochial schools been enacted in the states of Wisconsin and Illinois in the past year, while, on the other hand, we, for the same reason, condemn all demands upon the public funds for the erection or maintenance of parochial schools.
>
> For all the reasons stated, we must, as Lutheran Christians, grant our cordial approval to the fact that our brethren in the states of Wisconsin and Illinois have, whether in courts of law or at the ballot box, taken up and hitherto carried on the contest forced upon them against such laws, and we are furthermore determined to make most energetic opposition wherever in other states such or similar legislation may be attempted.[3]

The Lutheran Church-Missouri Synod spearheaded the organization of a political coalition including Wisconsin Synod Lutherans, Roman Catholics, Norwegians and Germans. They were successful in getting both the Wisconsin and Illinois laws repealed within a short time.

The United States Supreme Court has also affirmed parental rights in several landmark decisions during and shortly after World War I. The U.S. Supreme Court struck down an earlier decision of the Nebraska Supreme Court upholding legislation that had been passed to forbid the teaching of contemporary foreign languages before the child reached the eighth grade. In its decision the U.S. Supreme Court stated:

> "The legislature has attempted materially to interfere. . . with the opportunities of pupils to acquire knowledge, and the power of parents to control the education of their own."[4]

Oregon, in 1922, passed a law to require that all parents send their children to be educated in the public schools of the state. The Supreme Court (in handing down its opinion in Pierce vs. Society of Sisters,) established that the child is not the mere creature of the state:

"The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[5]

2. State Responsibility in Education

A realistic understanding of the state's responsibility in education and how the several states set out to meet that responsibility is equally important to a feasibility-study committee, board of education or school administrator.

In framing the United States Constitution, considerable care was given to prepare a document which would satisfy the needs of an infant nation but reserve certain prerogatives to the sovereign states. The Tenth Amendment has had tremendous influence on the development of educational organization and practice in our nation. The amendment, "Powers Reserved to State or People," reads

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Governmental function in the educational area was by this amendment delegated to the states. The outcome has been the establishment of fifty state systems of education.

The state is responsible for education. The U.S. Supreme Court stated in Pierce v. Society of Sisters that the state did possess the power to supervise the quality of education in private schools.[6]

Lutheran schools are not entirely private. The Lutheran school is a surrogate of the state, performing a state-mandated function, namely, compulsory education. In carrying out their supervisory functions states have established the right to review curriculum, require teacher certification, and to "define" school year. Not all states have exercised all of these powers but all states have the right to do so.

Fred F. Beach, in a 1958 publication titled The State and the Nonpublic School, identifies two general areas where private schools come under state jurisdiction

- State laws regulate nonpublic schools through statutes that apply generally to all individuals or organizations conducting business or charitable undertakings, and

- Laws that apply specifically to nonpublic schools as educational institutions.[7]

Areas which might involve state statute and should be considered in doing feasibility studies include

State approval	Curriculum
Compulsory education	Textbooks
Public support	Pupil transportation
Tax exemption	Records and reports
Special education	Teacher certification
Federal aid	Health and safety

This document will touch briefly on each of the above areas; however, for further information and detail on individual states, the study committee and administration are encouraged to secure a copy of their state's education code and a copy of Helen M. Jellison's State and Federal Laws Relating to Nonpublic Schools.[8]

a. Approval/Supervision

Twenty-eight states have statutory provisions that require certain or all nonpublic schools to conform to department of education requirements. Those states are Alabama, Alaska, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine (secondary), Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire (secondary), New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island (secondary), South Carolina, South Dakota, Vermont, Washington, West Virginia.

Twelve additional states grant approval on the request of a nonpublic school. They are California, Colorado, Connecticut, Louisiana, Maine (elementary), Massachusetts, Mississippi, New Hampshire (elementary), Oklahoma, Rhode Island (elementary), Tennessee, Wyoming.

> "The standards required to meet the approval of the department of education are stated implicitly in some States' statutes and quite explicitly in others. However, most State departments of education require that nonpublic schools maintain the same minimum standards that are applied to public schools."[9]

b. Compulsory Education

Forty-nine states and the District of Columbia have a statutory provision requiring school attendance. Mississippi stands alone in not having such a provision in their education code. Usually legislation requires that children within specific age limits attend school for a prescribed number of days each year.

Thirty-eight states require that nonpublic schools meet certain department of education standards in order to fulfill the compulsory-education mandate. Of these, four states - Alabama, Hawaii, Kansas and North Dakota - require state department approval and teacher certification in order to meet the compulsory-attendance provision.

Several factors have prompted the enactment of a large body of law designed to benefit the exceptional or handicapped children of compulsory school age.

- An increased sense of responsibility to provide for the needs of handicapped citizens on the part of state legislators,

- An increase in the amount of litigation in Federal courts requiring school districts to maintain equal educational opportunity for the handicapped,

- Several important pieces of Federal funding legislation (P.L. 94-142) involving the handicapped,

- Laws in almost all states mandating resource teachers, special classes, specially trained staff, transportation, and a variety of special education services and materials for the benefit of all exceptional children.

In many states where school districts cannot or do not maintain special education programs, they are required to pay the tuition costs for resident handicapped children to attend classes in another district which provides special education services. Private-school children are included in all state programs of special education; however, private schools are not.

c. Curriculum

The education codes of forty-six states contain certain educational standards or specific curriculum requirements for private schools.

Among the most common requirements with which private schools must comply is instruction in state and federal constitution and American history. Some states mandate health and safety instruction, particularly as it relates to alcohol and drug abuse.

d. Textbooks

Certain states have passed legislation to provide textbooks to children attending private elementary and secondary schools. Textbooks may also be purchased with funds available to children under Title IV-B of the Elementary and Secondary Education Act, as amended in 1976. In some states, these benefits are available through the local education agency, usually the public school district. In Nebraska, as in several other states, a Federal bypass has been imposed to facilitate the delivery of textbooks, library materials, testing services, and equipment to students in nonpublic schools under Title IV-B.

The U.S. Supreme Court has upheld as constitutional state legislation authorizing the free loan of textbooks to children in private schools.[10]

e. Pupil Transportation

Five states have constitutional provisions for public funds for the transportation of private-school children; in several states there are statutory provisions allowing this service.[11]

Permissive legislation is more common than provisionary legislation relative to transporting the private-school child. Restrictions usually include pick-up points along established routes. Most states provide publicly funded transportation for exceptional children enrolled in special education programs.

As with textbooks, pupil transportation has been upheld as constitutional by the U.S. Supreme Court.[12]

f. Records and Reports

In all but one state laws require either the registering of pupil attendance records and reports with local and/or state educational agencies or regulate the compulsory-attendance statutes to include proper record keeping, registering, and reporting. It is often a misdemeanor punishable by a fine for school officials to fail to submit attendance records to the proper authorities.

g. Teacher Certification

Teacher certification of nonpublic teachers is required in approximately one-third of the states. As stated above, there are four states which require certification to meet the compulsory-attendance laws.

States requiring the certification of nonpublic school teachers include Alabama, Alaska*, Hawaii, Idaho, Iowa, Kansas*, Louisiana, Maine, Michigan, Nebraska, North Carolina, North Dakota*, Ohio, Oklahoma*, South Dakota, Washington.[13]

h. Health and Safety

Almost all states have requirements for certain health and safety provisions. Immunization of children, tuberculin tests for teachers, and classes for children in hygiene and nutrition are some of the most commonly named provisions.

Most states also have legislation requiring school buildings to meet specific fire, health and safety codes. Generally, these statutes are not found in the education code of most states.

*Denotes teacher certification required to meet compulsory-attendance laws.

3. Tax Deductible Contributions or Tuition

The Internal Revenue Service says, "Contributions to a church are deductible even though some of those contributions are used to support a school." A 1964 IRS ruling states the following:

> It is a position of the Internal Revenue Service that payments to a church to meet the operating costs of a parochial school are charitable contributions with the meaning of section 170 of the Code, where the appeal for such contributions is directed to the church congregation as a whole without the parents of the children attending the school being singled out as a class, and the contributions are not in any way earmarked for the benefit of a particular child.

On the basis of IRS rulings, it is extremely important that tuitions not be camouflaged to appear as contributions. Tuition is money paid directly for the education of the child. It is not deductible. A set fee or even a suggested fee for parents of children enrolled is tuition.

A contribution is money given to a church on a free-will basis according to ability and commitment, placed into the treasury of the congregation for the total church program. Such giving is deductible.[14]

Feasibility study committees, boards of education or administrators are urged to study carefully the portion on "Tuition and Fees", E09-Funding Lutheran Elementary Schools.

4. Public Aid

Public aid is available to private schools, usually in the form of services to pupils. Certain types of public aid can make a significant difference in such areas as transportation, textbooks, food services, library resources, and specialized help for the disadvantaged. A complete treatment on the question of Public Aid can be found in E09-Funding Lutheran Elementary Schools.

The data presented in this document is accurate at the time of writing. However, many state education codes change frequently; it it important to review state codes and requirements frequently. Schools are also urged to check with their synodical and district education offices for current information.

5. Activities

The following activities are important when considering the legal requirements governing school management:

a. Secure and review a copy of the state education code.

b. Review the state statutes which apply specifically to private schools, giving particular attention to

Approval/accreditation

Compulsory attendance

Curriculum

Teacher certification

Textbooks

Pupil transportation

General building requirements, including health and safety codes and fire codes

c. Review carefully E09-Funding Lutheran Elementary Schools and prepare recommendations relative to Public Aid and Contributions or Tuitions for policy formulation by the board of education.

d. Secure guidelines for applying for approval status from the state department of education.

Note to the reader: You are urged to review the listing of documents on the last page of this booklet. Each document provides detailed information and help for the management of Lutheran schools.

ENDNOTES FOR PART ONE

1. Richard Dobbs Strahan, The Courts and the Schools, Professional Education Publications, Inc., Lincoln, Nebraska, 1973, p. 16.

2. Walter H. Beck, Lutheran Elementary Schools in the United States, Concordia Publishing House, St. Louis, Missouri, 1939, pp. 226-229.

3. Ibid., (Synodical proceedings 1890)

4. Meyer v. State of Nebraska (262 U.S. 401)

5. Pierce v. Society of Sisters (268 U.S. 510, pp. 534-5)

6. Ibid., p. 534

7. Fred F. Beach and Robert F. Will, The State and Nonpublic Schools, U.S. Department of Health, Education and Welfare, Office of Education, 1958, pp. 9-13.

8. Helen M. Jellison, State and Federal Laws Relating to Nonpublic Schools, U.S. Department of Health, Education and Welfare, Office of Education, 1975, p. 21.

9. Ibid.

10. Board of Education of Central School District v. Allen (392 U.S. 236. 1968)

11. Jellison, P. 25.

12. Everson v. Board of Education (330 U.S. 1, 1947)

13. Jellison, pp. 26-30.

14. Al H. Senske, Is It Tuition or a Deductible Contribution?, Board of Parish Education, The Lutheran Church-Missouri Synod, 1974, pp. 306-12).

PART TWO THE BOARD, PRINCIPAL AND TEACHER - UNDER LAW

This section of the handbook explores the responsibility and liability of the congregation, board, principal, and teacher in the Lutheran school setting.

A. INTRODUCTION

The private schools, unlike their public counterparts, have avoided the deluge of suits based upon civil and individual rights guaranteed under the 14th Amendment.

Legislation has produced an abundance of regulations involving equal opportunity, civil rights, energy, pensions, safety, confidentiality, labor, and taxes. Lawsuits in the private sector have increased as immunity to tort liability has decreased. Immunity is being eliminated in most jurisdictions either as a result of case law or by state legislatures.

The climate in the courts today is such that teachers, principals, and members of boards of education may be held liable for negligent acts, slander, or invasion of privacy. Even if an institution is granted immunity to tort liability, individual employees, or board members may well be liable for negligence.

For example, fire safety codes in some states make any person in authority, and especially trustees (Board of Education members) of a nonprofit corporation, personally liable if a death results from a fire during the period of time when the school is in violation of the fire safety code.

In the language of the law, a tort is "a wrongful act, not including a breach of contract or trust, which results in injury to another's person, property, reputation, or the like, and for which the injured party is entitled to compensation."[1]

Torts may either be intentional or unintentional. Intentional torts are injuries to another person resulting from actions designed to harm that person. Intentional torts are either "willful" or "wanton." Wanton conduct occurs when a person acts in a manner that is so reckless that injury to another person is likely to result. There need not, however, be an intent to harm a particular individual in cases involving wanton conduct.

Unintentional torts result from negligent conduct. Negligence is ". . . the failure to exercise that degree of care which under the circumstances, the law requires for the protection of other persons."[2] Negligence is the absence of care and can either be active or passive: that is, an act of commission or an act of omission. An act of commission is something one does that should not have been done, and an act of ommission is something not done that should have been done.

B. THE BOARD OF EDUCATION

> "In Lutheran school settings the congregation(s) is the primary responsible entity. A lawsuit that would be brought against a public school district in a public school setting would be brought against a congregation in a Lutheran school situation. The fact that a school is owned and operated by a church does not change the liability law and court procedures."[3]

The Board of Education generally is charged with the responsibility of serving as trustees for the congregation with regard to the operation of a Lutheran school. This responsibility should not be taken lightly, and a board should take every precaution to protect the congregation as the corporate body from liability obligations. The board should have clearly stated policies relating to discrimination, civil rights, student privacy, due process, and what parents and students, particularly those who are not members of the congregation or association, can rightfully expect and anticipate from their relationship with the school.

While it is true that no employee or no applicant has any constitutional right to employment in a private instutition, the Lutheran school cannot refuse employment based on discriminatory values. The "Civil Rights Act of 1964, Title VII" dealt with discrimination as to sex, race and national origin. The "Age Discrimination Act" followed shortly thereafter. Reverse discrimination resulting from the Bakke decision has further complicated the discrimination question. Reverse discrimination is possible when a decision is made to voluntarily select minority candidates primarily to achieve "better balance."

A landmark case was decided by the Supreme Court in June of 1976. In Runyon v. McCory, it was held that private schools have lost a certain degree of privateness by virtue of the fact that they enter the public sector advertising for students, "thereby performing a quasi-commercial activity." The court concluded that private schools cannot deny admission on account of race. The decision implied that denial of admission based on other "discriminatory" values would also be struck down by the court, but this has not been legally established.

The threat of suits based upon rights of privacy and due process is ever present; however, at the present time there is no court action on record involving private schools invading a student's privacy.

The following pages explore the constitutional questions of privacy, discrimination and due process and discuss how Lutheran schools can be guided by legislation and court action.

1. Family Educational Rights and Privacy Act

This act commonly known as the Buckley Amendment applies to schools which receive federal education funds. Nearly all Lutheran early childhood and elementary schools are not affected by this law. Dwight Crum of the Office of Education writes:

"The subject law applies only to public and private schools which actually receive Federal funds from programs administered by the U.S. Commissioner of Education. Since the vast majority of nonpublic schools receive no such funds, the law is not applicable to them. If a school happens to have a direct program grant, such as environmental education, then it must comply with Buckley. Please note that services provided to your children by the local public school agencies under the Federal education laws do not affect your exemption. Funds from school lunch programs would not apply since the program is not administered by the U.S. Commissioner of Education."

Even though a private school need not carry out the Buckley Amendment to the letter of the law, nevertheless, it should honor the spirit of the law insuring the parent and student rights of privacy.

Every Lutheran school should have a policy which guards the privacy rights of parents and students. The following checklist appears appropriate in developing such a policy:

a. School policy should express concern for helping students directly, through their parents, through school personnel, and through outside resources.

b. School policy should provide for a personal data recordkeeping system open to parents and teachers to use wisely in assisting the student's growth.

c. School policy should clearly define the purpose and intended use of any personal data and provide for gaining consent if the information is to be used for any other purpose.

d. School policy should provide for proceaures to correct records that are in error and to update the personal data of students.

2. Racial Nondiscrimination (I.R.S. Procedure 75-50)

The Internal Revenue Service (IRS) has issued a Revenue Procedure which sets the procedures necessary for private schools to give assurance that they have a racially nondiscriminatory policy regarding student enrollment. Failure to follow the established procedure may result in the loss of federal tax-exempt status of the school and the congregation(s) which operates the school.

The Board of Education should take action to assure compliance with the IRS procedure.

a. Policy on Racial Nondiscrimination

A policy statement such as the one below should be adopted when beginning a Lutheran school.

"(Name of school) admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national or ethnic origin in

administration of its educational policies, admission policies, scholarship and loan programs, and athletic and other school-administered programs."

There are two exceptions which a Lutheran school may wish to exercise.

- If a school does not have a scholarship and loan program the reference to that may be deleted.
- A school may refer to a preference in admissions given to members of synodical congregations and members of other Lutheran church bodies.

b. Brochures, Handbooks, and Catalogues

The above policy statement should be included in any brochures, handbooks, or catalogues dealing with student admissions, programs and scholarships.

c. Other Written Advertising

If a school issues written advertising - other than handbooks, brochures and catalogues - as a means of informing prospective students of its program, the written advertising should include the following reference:

"(Name of school) admits students of any race, color, and national or ethnic origin."

d. Recordkeeping Requirement

Each school should compile the following records and maintain them for the use of the IRS for at least three years after the academic year for which they were compiled.

- Records indicating the racial composition of the student body, faculty, and administrative staff for each academic year.
- If scholarships and financial aid is awarded, records sufficient to document that such assistance is awarded on a racially nondiscriminatory basis.
- Copies of all brochures, catalogues, and advertising dealing with student admission, programs, and scholarship.
- Copies of all materials used by or on behalf of the school to solicit contributions.

e. Publicity Requirements

All schools must publish a "Notice of Racial Nondiscrimination" in the form expressed in the school's policy. (See a. page 13.)

If less than 75% of the enrollment at the school for the preceding three years has consisted of members of synodical congregations and their children, and the children of other Lutheran church bodies, the school must then publish a notice in a newspaper meeting the following criteria:

- Publication of this notice must occur annually during the period of the school's solicitation for students, or, in the absence of a solicitation program, during the school's registration period.

- Placement, size and type size of the notice are governed by the following provisions of Revenue Procedure 75-50:

> "The notice must appear in a section of the newspaper likely to be read by prospective students and their families and it must occupy at lease three column inches. It must be captioned in at least 12 point bold face type as a notice of nondiscriminatory policy as to students, and its text must be printed in at least 8 point type.
>
> "If a school refers in its notice to a preference in admissions given to members of Synod congregations and members of other Lutheran church bodies, such reference must be made in space additional to the space required by the above-quoted provision.
>
> "Joint Notices. A single notice may be used by a number of schools in the same city if each school is separately identified and if all identifications of schools are made in space additional to that required by the above-quoted provision of Revenue 75-50."

Schools which meet the 75% test, need not fulfill the requirements as set forth above unless they advertise in newspapers of general circulation in their communities. They may instead, publish notice in the sponsoring congregation's church bulletin. However, the particular issue of the bulletin used for this purpose must also be mailed to all members of the congregation or congregations which sponsor the school.

There is no specific requirement as to the size and placement of the notice in a church bulletin.

Each year the school must file an IRS Form 5578. The form requires an individual who is authorized to take official action on behalf of the school to certify, under penalties of perjury, that to the best of his knowledge and belief, the requirements of Revenue Procedure 75-50 have been satisfied by the school.

The Form 5578 must be filed on or before the 15th day of the fifth month following

- The end of the fiscal period of the sponsoring congregation, if the school is not separately incorporated, or

- The end of the fiscal period of the school itself if the school is separately incorporated.

The above information of racial nondiscrimination was taken from three memoranda supplied by Dr. Al Senske to all Lutheran elementary and secondary schools in The Lutheran Church-Missouri Synod.[4]

Laws are subject to change at any time. As new laws are enacted, supplements to this document will be prepared.

3. Nondiscrimination on the Basis of Sex in Educational Programs and Activities . . . Title IX

Federal legislation regarding nondiscrimination on the basis of sex was passed in 1972 as part of the Educational Amendments. Commonly referred to as Title IX it states in part:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

According to the law, those schools which receive any type of federal assistance must abide by Title IX regulations. If a nonpublic school receives pupil services or materials under the Elementary and Secondary Education Act or if a school is involved in the federal school lunch and/or milk program, it is subject to the regulations. Failure to comply could result in a denial of all future federal assistance, the imposition of change, some serious sanctions, as well as adverse publicity for that local Lutheran school as well as all other Lutheran schools.

All schools, prekindergarten through secondary levels should review and modify as needed their practices on the basis of the Title IX regulations. Feasibility study groups for starting new schools should be aware of these regulations and policies should be adopted immediately upon beginning a new school operation.

The Department of Health, Education and Welfare prescribes six steps to help schools comply with Title IX regulations. Existing Lutheran schools and Lutheran schools just beginning should take the following steps in implementing the regulations:

Step One: Activate a Self-Evaluation Committee

> The purpose of the committee is to evaluate policies and procedures, to decide if any of them discriminate on the basis of sex, and to recommend to the board of education necessary changes. Included on the committee should be administrators, teachers, students and/or parents, an equal number of males and females.

Step Two: Designate an Employee Responsible for Compliance

> This person may be any employee. The principal, being in the best position to activate change and carry out an ongoing monitoring of compliance, would be a good choice. This person will be referred to as the "Designated Employee" in the following statements.

Step Three: Adopt and Publicize a Nondiscrimination Policy

> The regulations require that a congregation(s) operating a Christian day school publicize its policy on nondiscrimination. The following policy statement can serve as a guide:

NOTICE OF NONDISCRIMINATORY POLICY

_____ Lutheran Church, in operating its Christian Day School believes that educational opportunities and programs should be open to boys and girls on an equal basis, and that employment opportunities be available to men and women equally. This is also prescribed by Title IX of the Education Amendments of 1972. We therefore do not discriminate on the basis of sex in administering our education policies, programs, activities, and employment practices. However, since most teacher education graduates are women, it may be that teacher selection practices result in a slight majority of female teachers.

Inquiries about the nondiscrimination policies of _____ _____ Lutheran Church in operating its Christian Day School may be referred to (insert the name and address of the Designated Employee).

Regulations require that this policy be placed in a local newspaper from time to time. Annually would be sufficient. The policy should also appear in school publications such as newsletters, handbooks, bulletins, etc.

Step Four: Adopt a Grievance Procedure

Should a student or employee feel that the school does discriminate on the basis of sex, it is essential that there be a proper procedure for registering a complaint. The following procedure would be appropriate:

a. The student or employee should discuss the complaint with the Designated Employee. If the Designated Employee decides that the complaint is valid, steps will be taken by the Board to modify the policies involved.

b. If the Designated Employee decides the complaint is not valid and the student or employee is not satisfied with the ruling, an appeal may be made to a grievance committee. The grievance committee can be appointed by the principal; it should be an odd number of people representing both sexes. This committee will conduct a hearing and make a ruling on the basis of Title IX regulations. Appropriate policy changes will be recommended to the board of education.

Step Five: Give Notice to Students and Employees

The regulations require that students and employees be informed about the nondiscrimination policy and the grievance procedure. The following is a sample notice:

_____ Lutheran Church(s) in operating its Christian Day School believes that boys and girls who are students at this school, and the men and women teaching here, should be given equal opportunities. This is also prescribed by Title IX of the Education Amendments of 1972. The school has a committee which has reviewed our policies and practices and has recommended appropriate changes. Should you have questions or comments discuss them with (insert the name of the Designated Employee).

Should you have a complaint, also discuss it with (insert name of Designated Employee). Complaints determined to be valid will initiate steps toward modification. If your complaint is ruled to be invalid and you are not satisfied with that ruling, you may appeal to the grievance committee. You will be notified of a hearing. The grievance committee will then judge the validity of your complaint and make appropriate suggestions.

Step Six: Submit an Assurance of Compliance Form

Forms will be provided entitled "Assurance of Compliance." This form must be attached to any future request for federal assistance.

The Self-Evaluation Committee will want to consider carefully a number of subsections in the Title IX regulations. Attention should be given to "Treatment of Students" (86.31 ff) and "Employment Practices: Academic and Non-Academic Staff, Full and Part-Time" (86.42 ff).

A very helpful Title IX Self-Evaluation Handbook has been prepared by the Board of Parish Education, Lutheran Church-Missouri Synod. It is available for $2.50 and can be ordered from them. In addition to the Self-Evaluation Handbook, the committee should secure a copy of Dr. Al Senske's July, 1976 memo dealing with Nondiscrimination on the Basis of Sex in Educational Programs and Activities for an interpretation of "Treatment of Students," and "Employment Practices" sections of the Title IX Regulations.[5]

4. Due Process

Due process came to the forefront in public education following the Goss case in 1975. The Supreme Court in Goss established the right of public school students to be told of impending suspension, to know the reason for the action, and to comment on the case. Lutheran schools, as private institutions, are not subject to this ruling; however, the ruling should stimulate private schools to adhere to fundamental fairness doctrines. Lutheran schools would do well to follow a fair procedure before disciplining or expelling a student or before disciplining or dismissing a teacher.

Included in such a due process policy should be

- A notice to the student and his parent or, if it involves faculty, the teacher of the charge.
- Provide an opportunity for a hearing in which both sides of the question can be heard and understood.
- Establish some type of objective review procedure.

The more serious the case, the more elaborate a school should be in providing the conditions of due process as they have been formulated into guidelines by many states for their public schools.

"Until such time as the courts find sufficient state action in the operation of private schools to bring us within the purview of the 14th Amendment, we are not subject to due process. But if we don't pay attention to the principles of due process, the courts be they in Jefferson City, Missouri, or Washington, D.C., are going to find some way to bring state action into the independent schools" (Hugh Madden)

5. Copyright Law (P.L. 94-553)

A Board of Christian Education and school staff should study thoroughly the newly revised copyright law and the guidelines. These guidelines have been established to cope more realistically with the modern age of photocopying machines, cassette recorders, videotape recorders, computers and cable television. Even though copyright laws generally apply to individuals, boards of education can be helpful to their staff members by clarifying through policy the board's commitments to upholding the law and by providing the resources necessary for teachers to adequately perform their function.

The new law, P.L. 94-553, provides educators with (1) opportunities not previously available, as well as (2) new prohibitions to be heeded.

The treatment here will not be comprehensive and school administrators are encouraged to secure additional resource material on the copyright guidelines. The Board of Parish Education, Lutheran Church-Missouri Synod, 3558 South Jefferson Street, St. Louis, Missouri 63118, has a Packet of New Copyright Law Information available which contains -

- A brief alert to selected provisions
- Selected sections of P.L. 94-553 statutory language
- Excerpts from the reports of the Congressional committees which explain the intent of Congress in regard to certain sections.

"FAIR USE" provisions allow educators to copy copyrighted materials for purposes such as criticism, news reporting, teaching (including the making of multiple copies for classroom use), scholarship or research.

To determine what is fair use, the following factors must be considered:

- The purpose and character of the use, including whether such is of a commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for or value of the copyrighted work.

Numerical Guidelines and specifics related to usage are not as detailed as educators would like. There are, however, some standards identified in either the legislation or accompanying explanations of intent.

It is permissible to make single copies for research or for teaching. The teacher may make single copies of a chapter from a book, an article from a newspaper or periodical, a short story, essay, poem, chart, graph, diagram, drawing, cartoons or pictures from books or periodicals and newspapers.

One copy per student in class may be reproduced by a teacher if it meets the stipulations of brevity, spontaniety and cumulative effect.

The following types of copying do not fall under the fair use guidelines and should be avoided:

- Copying in order to create or replace or substitute for anthologies, compilations, or collective works.
- Copying from workbooks, standardized tests and answer sheets, or exercises (any consumable materials).
- Copying in order to not purchase books, reprints or periodicals.
- Copying under prescription of the principal, superintendent or board of education.
- Copying the same item repeatedly.
- Charging more than actual photocopying costs.

Sheet music may be reproduced if copyrighted copies that were purchased are not available for an imminent performance and if the reproduced copies are replaced by the purchased copies. Purchased copies of sheet music may be edited or simplified if it does not distort and if lyrics are not altered or added. Copies of sheet music may be made for classroom use if restricted to one per student and limited to less than a complete section or movement not to exceed 10% of an entire work. One copy of a complete section (performable unit) may be made for class use or research only if it is confirmed in writing to be "out of print" or is unavailable except in a larger work.

Only one copy of a sound recording may be made of performances by students for evaluation and rehearsal purposes. One copy of a sound recording of copyrighted music may be made for hearing exercises and examination purposes.

Copying sheet and recorded music cannot result in a substitute or replacement for collective works. Consumable materials may not be copied and copying for a performance with the exception noted above is forbidden. All legitimate copies of sheet music must include the copyright notice.

Also significant to schools is the legislation regarding libraries. Libraries may reproduce for circulation purposes one copy or one phonograph record of a work if it is done without any purpose of direct or indirect commercial advantage, if the library collections are open to the public, and if the copy includes a notice of copyright.

The following guidelines apply to schools that have an interlibrary loan arrangement. A library may reproduce up to six copies a year of a periodical published within the last five years (no limit on periodicals copyrighted over five years ago). Only six copies can be made "of or from a given work" during a calendar year. Reproduction dare not be an avoidance of subscription or purchase.

All libraries may make copies of unpublished works for preservation and security on published works for purpose of replacement of damaged and out-of-print copies that cannot be replaced at a fair price.

Libraries are not responsible for misuse of its unsupervised recording equipment provided the equipment displays a notice that the making of a copy may be subject to the copyright law.

P.L. 94-553 contains a general "innocent infringer" clause which includes teachers and librarians, among others, and the non-profit institutions of which they are a part. If guilty of a copyright violation, the clause allows for the opportunity to prove that the infringement was done in the honest belief that what was done constituted fair use.

> "The new Copyright Law is a result of much compromise. Some groups and organizations feel it is fair, others do not. It is helpful for educators to keep in mind that a copy system of 'help yourself to anything that is needed for school use' would eventually eliminate the development of reasonably priced new materials. Fellow educators and musicians would lose much incentive to create, produce, and publish. An interpretation of fair use that would be too broad would, in effect, eventually harm all teachers (and pupils) rather than protect them."[6]

C. THE PRINCIPAL

In reviewing the history dealing with the relationship between government in all its forms and private education in America, one finds that private schools have held a rather special and unique relationship with the courts. Private schools were considered to stand *in loco parentis* and, as such, courts were loathe to interfere with school operation, granting virtually the same independence permitted the family in the conduct of its own home. The rights, powers, and duties of the private school arise out of a contract, either a contract for employment or a contract for enrollment. Thus contract law is the basis of private school operation.

Change has occurred. Principals and teachers are being found liable for torts particularly as it involves negligence. Care should be exercised so proper administration of board policy occurs and diligent supervision, either direct or delegated, assures the students' safety while under the direction and supervision of the school.

The principal of a school should adhere to the following guidelines to insure proper administration:

1. An assembly or other meeting should be held periodically in which school rules for the safety of students are reviewed with both students and staff.

2. When instruction or direction for the safety of students in school are issued, the age and ability of the student must be taken into account.

3. There should be no time during the day when each student is not under the supervision of a member of the staff.

4. If your state requires that a certified person always be in charge of students, appropriate assignments should be made and a record kept of each assignment.

5. The staff should be instructed to report all dangerous conditions so that the principal may take steps to correct them. All such reports should be acted upon immediately.

6. Appropriate warning signs should be posted where potentially dangerous equipment is used, in parking areas and other potentially dangerous places.

7. All field trips should be approved by the principal. If there are any questions concerning the trip, the principal should investigate the matter and either disapprove the trip or impose appropriate limitations. Only students whose parents have signed permission slips should be permitted to go on the trip. The slip should indicate an acknowledgement by the parents of the nature of the trip and the time supervision of students will end. While such permission slips do not absolve school personnel of responsibility for negligence, they are important evidence that the parent had knowledge of, and gave consent to, his child's participation.

8. The principal should check with legal counsel as to whether private vehicles may be used to transport students for school-sponsored activities.

9. Either by a general procedure, or by specific instruction, the principal should always designate someone to be in charge when he is not present.

D. TEACHERS

> Negligence . . . The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a reasonable and prudent man would not do.

There exists in many states a "sovereign immunity" regarding the tort liability of institutions including congregations or associations which sponsor schools. Even so, individual trustees and individual employees of the school can still be sued for personal damages in connection with negligent acts. Because teachers usually have direct and specific supervisory responsibilities, they are the most vulnerable to lawsuits claiming personal injury. However, it must be emphasized that a teacher is not liable for personal damages every time a student under the teacher's supervision is injured in an accident. A teacher is only required to be as careful as a reasonable and prudent person would be under similar circumstances. To collect damages against a teacher, an injured student would have to show that the teacher's failure to act as a reasonable and prudent person was the proximate cause for the injury.

In looking for the major points of negligence, the teacher should be aware of three possible kinds of liability.

NEGLIGENCE - not carrying out teaching duty with reasonable care.

INTENTIONAL INTERFERENCE - infringement upon the rights of people to have a certain amount of freedom.

CONSTITUTIONAL INFRINGEMENT - interference with a person's rights as guaranteed by the U.S. Constitution.

The duties of the teacher which the courts have acknowledged regarding the safety of students are proper instruction, proper supervision, and proper maintenance. An illustration of proper instruction would be the proper handling and use of potentially dangerous equipment or objects in the classroom. The age, background and experience of the student is also a factor in proper instruction. Proper supervision on the part of the teacher involves his presence as well as his intervention in potentially dangerous situations. Duties involving proper maintenance involves such things as reporting potentially dangerous playground equipment, classroom equipment and other potentially hazardous objects to the proper authorities. There are three criteria the courts have used to determine negligence. Was there a duty to the student? Was that duty breached? Did the breach cause injury?

For example, many cases have involved injuries to students while the teacher left the classroom of students unsupervised. Even though a student is injured at the hands of another student such as pencil throwing or fighting, the courts have ruled that the teacher had a duty to supervise the students and that it was the breach of that duty which was the proximate cause of the injury to the student. In other words, "but for" the absence of the teacher, the accident would not have happened.

In addition to cases involving the duty to supervise, a number of cases pertain to the teacher's duty to instruct students adequately before attempting a potentially dangerous task, such as a chemistry experiment or a gymnastic exercise. Cases in this area suggest that teachers have a greater duty than merely telling students to read a textbook or instruction manual. Rather, teachers have the duty to warn students of the potential danger, to demonstrate where feasible, to closely monitor the task as the student performs it, and to provide appropriate safety apparatus.

Teachers may also be held personally liable for depriving students of constitutional rights. A recent Supreme Court case, Wood v. Strickland (1975) involved the related issue of whether individual school board members could be held personally liable for deprivation of a student's constitutional rights. The Court ruled that a board member could be liable "if he knew or reasonably should have known that the action . . . would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or to cause injury to the student." There is no reason to expect that any different standard would be applied to teachers sued for depriving students of their constitutional rights. Thus, teachers should make reasonable efforts to keep abreast of legal developments in the rights of students. Recent decisions on student suspensions and corporal punishment, for example, were widely reported in the media and a court might well find that a teacher "reasonably should have known" about these cases. Teachers are not expected to be constitutional scholars, but they can be expected to be knowledgeable of the leading legal developments affecting their profession.

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E. CONCLUSION

The entire subject of legal requirements governing school management is becoming increasingly complex. This document can help alert and inform boards of education and administrators concerning their legal responsibilities. Boards and administrators should study carefully the documents prepared by their synod's offices. These documents provide viewpoints, guidelines and, as appropriate, suggestions for school participation.

Boards and administrators may also want to consider engaging legal counsel. A competent attorney can help a school remain abreast of legislation which affects the school; legal counsel can also assist in preparing policy and guidelines to assure the school's compliance with legal requirements.

Note to the reader: You are urged to review the listing of documents on the last page of this booklet. Each document provides detailed information and help for the management of Lutheran schools.

ENDNOTES FOR PART TWO

1. The Random House Dictionary, unabridged, Random House, New York, 1967.

2. Ibid.

3. Al H. Senske, Negligence: When is a Principal Liable?, footnoted as legal memorandum, National Association of Secondary Principals, January, 1975.

4. Al H. Senske, Racial Nondiscrimination, three memoranda, Board of Parish Education, St. Louis, Missouri, January 16, 1976; March 29, 1976; April 15, 1978.

5. Al H. Senske, Nondiscrimination on the Basis of Sex in Educational Programs and Activities, Board of Parish Education LCMS, July, 1976.

6. Al H. Senske, When to Copy and When Not to Copy, memorandum, Board of Parish Education LCMS, January, 1977.

7. National Association of Secondary School Principals, Negligence - When is a Principal Liable, memorandum, Reston, Virginia, January, 1975.

PLANNING FOR LUTHERAN ELEMENTARY SCHOOLS

E01	WHY THE LUTHERAN SCHOOL	Rev. Paul Pallmeyer Minneapolis, Minnesota
E02	GUIDELINES FOR STARTING A NEW SCHOOL	Mr. Neal Meitler Dr. Martin Wessler Milwaukee, Wisconsin
E03	BOARD OF EDUCATION HANDBOOK	Dr. Glenn Bracht Waverly, Iowa
E04	PERSONNEL HANDBOOK	Mr. Kenneth Markworth Waverly, Iowa
E05	RECRUITMENT/PUBLIC RELATIONS/TRANSPORTATION HANDBOOK	Mr. Richard Sauer Ft. Wayne, Indiana
E06	LEGAL REQUIREMENTS	Mr. Wilbur Tewes Appleton, Wisconsin
E07	CURRICULUM PLANNING GUIDELINES	Dr. Glenn Kraft Seward, Nebraska
E08	FINANCIAL PLANNING AND ACCOUNTING HANDBOOK	Mr. Neal Meitler Milwaukee, Wisconsin
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E10	BUILDING AND EQUIPMENT PLANNING	Mr. Robert Eggold Topeka, Kansas
E11	THE ROLE OF ELEMENTARY SCHOOL IN CHANGING COMMUNITIES	Mr. Donald Kell Ann Arbor, Michigan
E12	PARENTS AS PARTNERS	Mr. Eldor Kaiser Appleton, Wisconsin
E13	MODEL LUTHERAN SCHOOLS	Mr. Ellsworth Kierbs Seward, Nebraska

The above materials can be ordered from:

Board of Parish Education
The Lutheran Church-Missouri Synod
3558 South Jefferson Avenue
St. Louis, Missouri 63118

or

The American Lutheran Church
Mr. Don Vetter
Wartburg College
Waverly, Iowa 50677

The most effective agencies available to the Church for equipping God's people for ministry are the Lutheran elementary and secondary schools.

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